



May 16, 2001

Ms. Susan K. Steeg
General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-2034

Dear Ms. Steeg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147324.

The Texas Department of Health (the “department”) received a request for all memos, faxes, letters, etc. between the department and National Heritage Insurance Co. You state that you have released some of the responsive information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You claim that a portion of this information is confidential pursuant to sections 12.003 and 21.012 of the Human Resources Code. Sections 12.003 and 21.012 prohibit the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977). It appears that release of the information you claim is confidential under sections 12.003 and 21.012 of the Human Resources Code would not be for purposes directly connected with the administration of the department. It also appears that the documents containing this information constitute "any information concerning" persons applying for or receiving assistance. Therefore, these documents are confidential under sections 12.003 and 21.012 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code.

You also claim that some of the submitted documents are medical records that are protected from disclosure under section 552.101 in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). We agree that the submitted information contains medical records that may only be released in accordance with the access provisions of the MPA. *See* Occ. Code §§ 159.002(c), 159.004, 159.005; *see also* Open Records Decision No. 598 (1991) (in governing access to specific subset of information, Medical Practice Act governs over more general provisions of the Public Information Act). We have marked these medical records for your review.

You also assert that one of the submitted documents is a juvenile court order that is confidential pursuant to section 58.007(b) of the Family Code. Section 58.007 provides in pertinent part:

1. Except as provided by Article 15.27, Code of Criminal Procedure, the records and files of a juvenile court, a clerk of court, a juvenile probation department, or a prosecuting attorney relating to a child who is a party to a proceeding under this title are open to inspection only by:

- a. the judge, probation officers, and professional staff or consultants of the juvenile court;
- b. a juvenile justice agency as that term is defined by Section 58.101;
- c. an attorney for a party to the proceeding;
- d. a public or private agency or institution providing supervision of the child by arrangement of the juvenile court, or having custody of the child under juvenile court order; or
- e. with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Fam. Code § 58.007(b)(1)-(5). You state that the department received the juvenile court order in connection with its role as the state's Medicaid administrator. It does not appear that any of the exceptions to disclosure under section 58.007(b) of the Family Code apply in this instance. Therefore, we conclude that you must withhold the juvenile court order from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 58.007(b) of the Family Code. We note that the submitted information contains another juvenile court record which must also be withheld from disclosure pursuant to section 58.007(b) of the Family Code. We have marked both records for your review.

You claim that the submitted social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of Title 42 of the United States Code. A social security number or "related record" may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it is obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). You state that the social security numbers contained within the submitted information were obtained or are maintained by the department pursuant to section 1396a et seq. of Title 42 of the United States Code, section 552a et seq. of Title 5 of the United States Code, and section 441.182(c)(4), (5) of the Government Code. You further state that these federal and state statutes were enacted or amended on or after October 1, 1990 to provide the department with the authority to obtain or maintain these social security numbers.

You do not explain, nor were we able to determine, how section 1396a et seq. of Title 42 of the United States Code provides the department with the authority to obtain or maintain these social security numbers. Therefore, we cannot conclude that this statute provides the department with this authority. Furthermore, we note that the department is not an agency within the scope of section 552a et seq. of Title 5 of the United States Code, also known as the Federal Privacy Act of 1974. *See* Attorney General Opinion MW-95 (1979). Therefore, the department has no authority to obtain or maintain these social security numbers pursuant to that statute. Finally, we note that section 441.182(c) (4), (5) of the Government Code pertains to the duties of the state records administrator who is authorized by the director and librarian of the Texas State Library and Archives Commission to administer the state records management program. *See* Gov't Code §§ 441.180(12), 441.182(b), (c). These provisions state in pertinent part that the administrator shall "maintain in a safe and secure manner all state records in the physical custody of the [state records management] program" and "preserve the confidentiality of all confidential state records in the physical custody of the [state records management] program." Neither provision, however, authorizes the department to obtain or maintain these social security numbers or any related record. Therefore, the department has no authority to obtain or maintain these social security numbers pursuant to section 441.182(c)(4), (5) of the Government Code. Since you cite to no other law enacted on or after October 1, 1990 which gives the department authority to obtain or maintain these social security numbers, we have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I) of Title 42 of the United States Code. Accordingly, we cannot conclude that the social security numbers are excepted from disclosure under section 552.101 of the Government Code. We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, you should ensure that the numbers were not obtained or are maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See* Open Records Decision No. 574 at 5 (1990). Purely factual communications from attorney to client or between attorneys representing the client are not protected. *See id* at 3. We have marked the information that constitutes an attorney's legal advice or opinion and may, therefore, be withheld under section 552.107 of the Government Code.

Finally, you claim that some of the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code

provides that “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [disclosure] if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov’t Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that a portion of the information excepted from disclosure under section 552.108 was requested by the Medicaid Fraud Control Unit (“MFCU”) of the Office of the Attorney General for use in open investigations of certain Medicaid providers. You enclose with the submitted information a memorandum from MFCU which requests that this information be withheld from disclosure since its release would interfere with the detection, investigation, and prosecution of crime. You also state that a portion of the information excepted from disclosure under section 552.108 is part of a criminal grand jury investigation. You enclose with the submitted information a letter from a Travis County Assistant District Attorney which states that this information is the subject of a criminal grand jury investigation and requests that it be withheld from disclosure. Based on your representations, the submitted letters from MFCU and the Travis County Assistant District Attorney, and our review of the relevant information, we find that release of this information would interfere with the detection, investigation, or prosecution of crime. Therefore, it is excepted from disclosure pursuant to section 552.108(a)(1). *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision No. 372 at 4 (1983) (stating that where an incident allegedly involving criminal conduct remains under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of related information). We have marked the information that you may be withheld under section 552.108 of the Government Code.

In summary, you must withhold from disclosure the documents that we have marked pursuant to section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resources Code. You may release the medical records that we have marked only in accordance with the access provisions of the MPA. You must withhold from disclosure the juvenile court records that we have marked pursuant to section 552.101 in conjunction with section 58.007(b) of the Family Code. We have no basis for concluding that any of the social security numbers in the file are excepted from disclosure pursuant to section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of Title 42 of the United States Code. You may withhold the marked portions of the submitted email communications under section 552.107 of the Government Code. You may withhold from disclosure the information that we have marked pursuant to section 552.108 of the Government Code. You must release the rest of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

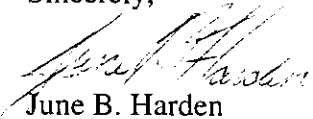
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden", written in dark ink.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/RJB/seg

Ref: ID# 147324

Encl. Marked documents

cc: Ms. Polly Ross Hughes
Houston Chronicle
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(w/o enclosures)